18-2323-cv(L), 18-2552-cv(XAP)

United States Court of Appeals

for the

Second Circuit

TIME WARNER CABLE OF NEW YORK CITY LLC,

Petitioner-Cross-Respondent,

– v. –

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

BRIEF AND SPECIAL APPENDIX FOR PETITIONER-CROSS-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner/ Cross-Respondent Time Warner Cable of New York City LLC states that at the time of the events at issue in this appeal, it was wholly-owned by Time Warner Cable Enterprises LLC, which was wholly owned by Time Warner Cable Inc., a publicly traded company. Charter Communications, Inc. now owns Time Warner Cable Enterprises LLC, and is a publicly held corporation; Liberty Broadband Corporation, also a publicly held company, owns 10% or more of Charter Communications, Inc.'s stock.

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STATEMENT OF JURISDICTION

This is a petition for review of a June 22, 2018 Decision and Order by Respondent/Cross-Petitioner National Labor Relations Board (NLRB or the "Board"), reported at 366 NLRB No. 116 (2018), which found that Petitioner/ Cross-Respondent Time Warner Cable of New York City LLC (TWC) violated Section 8(a)(1) of the National Labor Relations Act (NLRA or "the Act"), 29 U.S.C. § 158(a)(1). (*See generally* Docket No. 2 or Special Appendix ("SPA").) The Board had jurisdiction over that underlying unfair labor practice (ULP) case pursuant to Section 10 of the NLRA, 29 U.S.C. § 160. This Court has jurisdiction to review the Board's decision and cross-application for enforcement pursuant to 29 U.S.C. § 160(e) and (f). The Petition for Review was timely filed on July 20, 2018. (Appendix ("A") 617.)

STATEMENT OF THE ISSUE PRESENTED

Did the NLRB err in finding that TWC committed an unfair labor practice by questioning its employees about an unlawful mass picket, given that the Board found that the employees' picketing in question was not protected under the NLRA, and that Board law establishes that an employer's actions taken in reaction to unlawful and unprotected picketing activity do not violate the NLRA?

STATEMENT OF THE CASE

The operative facts and procedural history of this case are accurately set forth in the decisions by the Board and its Administrative Law Judge (ALJ) Michael Rosas, and are generally undisputed for purposes of this appeal.

I. The Parties and Their Collectively Bargained No-Strike Agreement

TWC (and now its corporate successor, Charter Communications, Inc.) provides cable television, internet, and telephone services to more than one million residential and commercial customers throughout the New York City area. TWC's Paidge Avenue facility in Brooklyn supports such cable services for all of the Company's residential and commercial customers in Manhattan south of 86th Street. (SPA 1, 8.)

The International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 3 ("Local 3" or the "Union"), is, in this Court's words, a union with a " 'long history of unfair labor practices,' " whose "organizing activities have been oft-reviewed by this Court." *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 471 F.3d 399, 402 (2d Cir. 2006) (quoting *NLRB v. Local 3*, 861 F.2d 44, 45-46 (2d Cir. 1988)). (Docket 2, at 1, 4, 9.) TWC and Local 3 were parties to a collective bargaining agreement covering approximately 1,600 cable technicians and foremen from April 2009 through March 2013. (SPA 1.)

The 2009-13 agreement included a grievance/arbitration provision (*id.* at 2, 9), as well as a "no-strike clause" that stated: "There shall be no cessation or stoppage of work, service or employment, on the part of, or at the instance of either party, during the term of this Agreement." (*Id.* at 8.)

After bargaining over a successor collective bargaining agreement, on March 28, 2013 the parties executed a Memorandum of Agreement ("MOA," also sometimes referred to as an "MOU") specifying amendments to the 2009-13 agreement to be effective from April 1, 2013 to March 31, 2017.[1] (A30, A603-04; SPA 8.)

II. The Contract-Breaching, Unlawful Mass Picket of April 2, 2014

The events underlying the instant appeal arose out of a blockade of TWC's facility on Paidge Avenue in Brooklyn on April 2, 2014.

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[1] On April 4, 2014, employees unanimously ratified the MOA but when TWC thereafter furnished Local 3 the draft of a full and formal successor collective bargaining agreement on May 14, 2013, which omitted certain facility-specific "riders," the Union refused to sign it. (SPA 8, 13.) The Company and the Union then negotiated over the riders for nearly a year, and then TWC filed an unfair labor practice charge with the NLRB pursuant to *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941), alleging that the Union's refusal to execute the parties' agreement violated NLRA Section 8(b)(3) and 8(d), 29 U.S.C. §§ 158(b)(3) & (d). (SPA 8.) The NLRB's Regional Director found merit to the charge and issued a complaint against Local 3, and the matter proceeded to a hearing. (*See id.*) In the meantime, while that complaint against Local 3 was pending and notwithstanding the dispute over whether the riders were included in the new collective bargaining agreement, "the Company implemented several changes contained in the MOU as of April 1, 2013," including increased wages and payments to the Union's annuity fund, as the ALJ's opinion notes. (SPA 8, 13.) Given the Board's conclusion below that the no-strike provision of the predecessor collective bargaining agreement continued in effect by virtue of the MOA and rendered the picketing involved here unprotected by the NLRA, the dispute over Local 3's refusal to execute the overall collective bargaining agreement is irrelevant to this appeal.

Between 6:30 a.m. and 8:00 a.m. on a typical workday in 2014 (the period relevant to this matter), roughly 150 Paidge Avenue-based field technicians (*i.e.*, the employees who install and repair customers' cable service) started their shifts at either 7:00 or 7:30 a.m.; those technicians arrived at the Paidge Avenue facility, parked their personal vehicles inside its parking area, entered the facility to receive assignments from their foremen, and then drove designated Company vehicles to service customers. (SPA 9.)

However, notwithstanding the clear "no stoppage of work" language of the 2009-13 collective bargaining agreement and its undisputed reincorporation by reference into the 2013-17 MOA, on April 2, 2014 Local 3 engaged in a blockade of the Paidge Avenue facility that effectively shut down its operations from about 6:25 a.m. until about 8:00 a.m., as Local 3 and its Business Representative Derek Jordan led a mass demonstration that they later insisted was a "safety meeting"[2] outside the facility. (SPA 1-2, 9-10.) As described in the Board's opinion, dozens of Local 3 members and Local 3-represented TWC employees parked their cars or stood in the middle of the street leading to the facility and to a New York City Fire Department annex next door, which houses emergency vehicles. (SPA 1-3. 8-10.)

[2] The Board accepted the conclusions of the ALJ, and the arbitrator decision before that, that Local 3's characterization of the blockade as a "safety meeting" was a mere pretext. (*See* SPA 2, 10.)

As the Board found, "[t]he effect was to prevent vehicles from entering the block or entering the facility," and "to prevent the Respondent's service trucks from departing for work assignments." (SPA 1.) Since, as noted, many TWC employees begin their shifts at 7:00 or 7:30, this blockade kept dozens of employees from timely punching-in to work or heading into the field for service appointments. (SPA 1-2.) "There is no dispute that this obstruction caused a 'ripple effect' of delayed or missed service appointments for the rest of the day." (*Id.* at 1.)

III. TWC's Investigation and Discipline of the Blockaders

In the aftermath of the April 2, 2014 blockade, the Company investigated what had occurred, and interviewed the participants identified on its surveillance video footage, in order to determine the appropriate actions in response.

In the course of those interviews, participants were asked "whether they were part of the group of employees who gathered outside the Paidge Avenue facility on April 2, how they got to work, whether they parked, if they arrived in a company vehicle, and what time they arrived." (SPA 4, 10.) "If the employee denied being present, he/she was shown photographs or the video indicating otherwise" and then, "[a]fter establishing that the employee was present at the gathering," he or she was asked: "Who told you about this gathering?"; "When did

you receive notification of the gathering?"; "How was this event communicated to you?"; and "What were you told about the reason for the protest?" (SPA 4.)

Further, "[a]ny employees professing ignorance about the gathering and claiming not to be involved were asked why they remained outside and if they attempted to contact a manager or otherwise attempt[ed] to enter the facility." (*Id.*) And employees were also asked about the collective bargaining agreement and whether they were "familiar with the section that prohibits cessation or stoppage of work," which was then read to them. (SPA 4, 10.)

Four employees (Ralf Andersen, Azeam Ali, Diana Cabrera, and Frank Tsavaris) were identified in the video footage but not scheduled to work that day; they were accordingly asked: "Why did you come to work? Did anyone in management direct you to come to work?" (SPA 4, 11.) As the ALJ found, the four "admitted to being a part of the group that gathered in the middle of Paidge Avenue." (SPA 10, n.12.) Two conceded that they came in response to the Union's call for a "safety meeting," while two gave what ALJ Rosas later termed "absurd" and "preposterous" explanations for how they "inadvertently stumbled onto the scene" after driving scores of miles from their homes early that morning. (*Id.*) TWC then issued the four employees disciplinary suspensions from work on May 22, 2014, which the Board concluded did not violate the NLRA, and which are not at issue in this appeal. (*Id.* at 2, 4.)

IV. TWC and Local 3 Arbitrate and Litigate the Blockade

As summarized by the Board, TWC also "initiated a grievance/arbitration proceeding against the Union," contending that the blockade "violated the no-strike clause in the parties' collective-bargaining agreement." (SPA 2.) The parties "voluntarily agreed to submit this question to arbitration," and on December 12, 2014, an arbitrator found: (1) that the Union's "safety meeting" was a pretext designed to "impede[] ready access to the Company's . . . facility for all employees seeking to report to work," and (2) that by "involv[ing] bargaining unit employees . . . until long past their scheduled start times" and "timing [the] meeting in order to exacerbate[] the impact on the Company's installation and service operations," the Union "effectively and materially impeded the Company's normal business operations" and thus "the Union violated the no-strike clause." (*Id.*)

Then on November 30, 2015, the arbitrator issued a final award of $19,297.96 in damages payable by the Union to TWC. (SPA 2, 10.) TWC applied to confirm that award in the U.S. District Court for the Eastern District of New York, and on March 16, 2016, District Judge Jack Weinstein confirmed it. *Time Warner Cable of N.Y.C. LLC v. IBEW, AFL-CIO, Local Union No. 3*, 170 F. Supp. 3d 392, 418-19 (E.D.N.Y. 2016). This Court affirmed Judge Weinstein's decision. *See Time Warner Cable of N.Y.C. LLC v. Int'l Bhd. of Elec. Workers, AFL-CIO, Local Union No. 3*, 684 Fed. App'x 68 (2d Cir. 2017).

VI. NLRB Proceedings on TWC's Blockade Investigation and Discipline

While the Company grieved, arbitrated, and litigated Local 3's blockade of the Paidge Avenue facility, the Union filed the unfair labor practice charge against TWC underlying this case on April 18, 2014 (and amended it on August 14, 2014). (A23, 29.) The amended charge alleges that TWC violated NLRA Section 8(a)(1) and (3) by, among other things, "interrogating employees about their and their co-workers' protected and concerted activities," and suspending four employees "for participating in a safety meeting with the Union on public property." (A29.)

On January 5, 2015, the Regional Director for the NLRB's Region 2 dismissed the charge, because the April 2, 2014 blockade clearly violated the no-strike clause in the parties' collective bargaining agreement, and the participating employees' suspensions flowed from their misconduct during that unprotected strike and "were based on the Employer's investigation into and assessment of the level [of] employees' culpability for alleged misconduct, rather than on the level of employees' Section 7 protected activity."[3] (A30-32.)

[3] The Regional Director later revoked her dismissal of Local 3's charge on May 21, 2015, based on the ALJ's conclusion, in the dispute over Local 3's refusal to execute the full collective bargaining agreement, that the Company and Union had supposedly never reached a "meeting of the minds" on that agreement overall. (A34; *see also* n.1, *supra*.) Notably, though, the Regional Director did not reconsider her prior determination that "the evidence establishes that the Employer's investigation into the strike activity was in part prompted by the fact that access to the Employer's facility was blocked during the April 2 job action," and that TWC had conducted an "investigation into and assessment of the level [of] employees' culpability for alleged misconduct, rather than on the level of employees' Section 7 protected activity." (A30-31.)

The case was tried before ALJ Rosas on April 11-13, 2016. (SPA 7.) On June 14, 2016, he issued a recommended decision. (SPA 15.) TWC, the Union, and the NLRB's General Counsel each filed exceptions to ALJ Rosas' decision with the Board. (*See* A544-79.) On June 22, 2018, the Board issued the Decision and Order at issue in this appeal. (SPA 1.) It concluded that "the employees participated in unprotected activity" and TWC "was legally free to discipline them for doing so," because: (1) "the parties voluntarily agreed to submit to an arbitrator the question whether the events of April 2 violated the terms of the no-strike clause"; (2) the arbitrator found that "the Union, by blocking the entrances to the Respondent's facility during the April 2 demonstration . . . violated the terms of the parties' no-strike clause, which was not limited to simply withholding one's labor when scheduled to work" (a conclusion that "[t]he district and appellate courts subsequently confirmed and enforced"); and thus (3) "employees who participated in that demonstration, regardless of the nature of their participation, were themselves engaged in unprotected activity and were subject to discipline." (SPA 1, 3.)

The Board noted that "this conclusion is not premised on a finding that 'a no-strike clause was in effect' on April 2 by virtue of a previous agreement by the parties to extend, in whole or in part, their collective-bargaining agreement"; rather, because "[t]he parties themselves specifically asked the arbitrator to

determine whether the April 2 demonstration violated the terms of the no-strike clause," and the arbitrator determined "that the demonstration did violate that no-strike clause, which means it never enjoyed the protection of the Act," the Board, while "not bound by the arbitrator's determination," is "not barred from holding the parties to it in the particular circumstances of this case." (SPA 3, at n.12.)

The Board also concluded that while investigating an unprotected demonstration, TWC "had the right to inquire about the employees' and the Union's participation in that event to a greater extent than if no unprotected conduct had occurred or if it were interviewing employees who clearly were only bystanders." (SPA 4.) Nevertheless, the Board opined that such inquiry was "required to focus closely on the unprotected misconduct and to minimize intrusion into Section 7 activity." (*Id*.) With respect to the questioning at issue, the Board reasoned that because TWC "through its video, had already established specifically what had happened, and it had identified by the same means many of the employees who participated in the event," it had "no need" to "inquire into the activity of any employees prior to the event, except . . . specifically to identify the additional individuals who were actual participants." (SPA 4-5.) The Board then identified three of TWC's questions as unlawfully coercive under Section 8(a)(1): "Who told you about this gathering?"; "When did you receive notification of the gathering?"; and "How was this event communicated to you?" (SPA 5.) The

Board reasoned that such questions "intruded into Section 7 communications between employees without directly seeking identification of other individuals who were present at and participated in the unlawful demonstration." (*Id.*)

SUMMARY OF ARGUMENT

The Board found that the April 2, 2014 blockade was entirely unprotected by the NLRA. As a consequence, the Board correctly found that TWC's suspensions of blockade participants did not violate the NLRA. Thus, the *only* question in this appeal is the extent to which TWC, having the undisputed right to discipline the employees who blockaded its facility, could question employees before meting out such discipline – and confirm that they actually participated in the misconduct, hear whether there were any extenuating circumstances that could explain or justify their behavior, and ascertain who else took part in the illegality.

The Board says no, and focuses particularly on TWC's asking its employees to reveal who told them about the illegal gathering they attended, when they heard of it, and how it was communicated. But the conclusion that these routine investigatory questions about an unprotected blockade violate the NLRA is irreconcilable with the Board's own decisions squarely holding to the contrary and plainly allowing for such industrial due process, and the Board offers no justification for departing from its own well-established precedents.

For this reason, as explained more fully below, this Court should set aside that portion of the Board's decision finding that TWC committed an unfair labor practice when it questioned its employees about their unprotected activity, and it should deny the Board's cross-petition seeking to enforce that decision.

LEGAL STANDARDS

Appellate review of the NLRB "does not function as a mere 'rubber stamp.' " *Laborers' Int'l Union of N. Am. v. NLRB*, 945 F.2d 55, 58 (2d Cir. 1991) (quoting *NLRB v. Local 584, Int'l Bhd. of Teamsters*, 535 F.2d 205, 208 (2d Cir. 1976)). This Court reviews the Board's legal conclusions for a "reasonable basis in law," and the Board's application of law to facts *de novo*. *Novelis Corp. v. NLRB*, 885 F.3d 100, 106 (2d Cir. 2018) (internal quotations omitted).

Although this court "afford[s] the Board a degree of legal leeway," it upholds NLRB determinations only "if not arbitrary and capricious." *Long Island Head Start Child Dev. Servs. v. NLRB*, 460 F.3d 254, 257 (2d Cir. 2006) (internal quotations omitted). In particular, this Court examines whether an NLRB decision "accurately reflects its own caselaw"; if it "departs from prior interpretations of the Act without explaining why that departure is necessary or appropriate," the Board "exceed[s] the bounds of its discretion." *Serv. Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 442 (2d Cir. 2011) (internal quotations omitted) (citing, *inter alia*, *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("the

consistency of an agency's position is a factor in assessing the weight that position is due.")). *See also ManorCare of Kingston, Pa., LLC v. NLRB*, 823 F.3d 81, 85 (D.C. Cir. 2016) ("we will reverse the Board's decision if it is not reasonable" and is "irreconcilable with the Board's own precedent") (internal quotations omitted).

ARGUMENT

THE NLRB ERRED IN HOLDING THAT TWC COMMITTED AN UNFAIR LABOR PRACTICE BY ASKING EMPLOYEES ABOUT THEIR OWN AND THEIR CO-WORKERS' UNPROTECTED PARTICIPATION IN CONTRACT-BREACHING, FLAGRANTLY UNLAWFUL ACTIVITY

As noted, this Court should not endorse Board decisions that are based on wholly unreasonable constructions of the NLRA, or that are irreconcilable with the Board's own precedent. The Board's decision here is both, so TWC's petition for review should be granted and the Board's order should not be enforced.

Because the Union blockade of TWC's facility was unlawful and unprotected by the NLRA, as was employee participation in it, TWC was entitled to question employees about that illegality in order to determine its response. Even the Board admitted in its decision that TWC "had the right to inquire about the employees' and the Union's participation in that event. . . ." (SPA 4.) Thus, the *only* issue in this case is the *extent* to which TWC could lawfully question suspected wrongdoers to confirm the details of their activity, to hear whether they had any excuse for their actions, and to learn who else was involved.

In its decision, the NLRB concedes TWC's right to question its employees in theory, but it adds a condition not found in any prior case law and one which, by all appearances, was created out of whole cloth for purposes of this case: that such questioning must "focus closely" on the unprotected conduct, and must not "inquire into the activity of any employees prior to the event, except . . . specifically to identify the additional individuals who were actual participants." (SPA 4-5.) On that basis, the Board held that three questions propounded by TWC were unlawful: "Who told you about this gathering?"; "When did you receive notification of the gathering?"; and "How was this event communicated to you?" (SPA 5.) But no authority – not even the cases cited by the Board – support its position, particularly its arbitrary list of these three forbidden questions propounded by TWC to employees. To the contrary, the Board's own cases, and common sense, dictate that TWC was entitled to question its employees in the manner it did without violating the NLRA.

"The [NLRA] does not make it illegal *per se* for employers to question employees about union activity"; rather, such questioning constitutes unlawful interrogation, violative of the NLRA, only where it is proven that "under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere

with employees in the exercise of their Section 7 rights."[4] *Amcast Auto. of Ind., Inc. (John Rowe)*, 348 N.L.R.B. 836, 837 (2006). No such restraint, coercion or interference can be found where, as here, the subject matter of the questioning is conduct not protected by Section 7 at all. Thus, just as an employer may discipline employees' clearly unprotected mass picketing,[5] it is also entitled to investigate such conduct and ask the participants about it.

The Board's law has long been clear: questioning of employees does not violate the Act where "the conduct about which the interrogation took place was not protected." *HCA/Portsmouth Regional Hosp.*, 316 N.L.R.B. 919, 931 (1995).

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[4] Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

[5] As discussed above, the Board concluded that the mass picketing in question was unprotected because Local 3 agreed to submit to an arbitrator the question of whether such picketing violated the parties' collectively bargained no-strike provision. But it is worth noting that labor actions such as "obstructing entrance to and egress from [a] company's factory," and "obstructing the streets and public roads surrounding the factory" have been held unprotected and punishable for over 75 years. *See Allen-Bradley Local No. 1111, United Elec., Radio and Machine Workers of Am. v. Wisc. Employment Relations Bd.*, 315 U.S. 740, 748 (1942). Even under Board law, barricading TWC's facility and the public street leading to it was categorically illegal, and employees' participation in it obviously unprotected and punishable. *See, e.g., Kapstone Paper & Packaging Corp.*, 366 N.L.R.B. No. 63, slip op. at 2 (2018) (affirming ALJ conclusion that "intentionally swarm[ing] and block[ing] the [vehicle's] egress" from employer facility was unprotected and warranted termination); *Tube Craft*, 287 N.L.R.B. 491, 493 (1987) ("instances of blocking access, . . . together with the . . . incident in which three of the discharged strikers attempted to obstruct the exit of another truck . . . is sufficient here to persuade us that the conduct of the discharged strikers was unprotected"); *and Bingham-Willamette Co.*, 279 N.L.R.B. 270, 277 n.14 (1986) ("Davis' acts exceeded the bounds of peaceful picketing and persuasion and were unprotected. Davis' acts of intimidation and violence – blocking a truck's exit from the Respondent's plant, jumping on the truck and pounding on the truck's window – are each sufficient to warrant discharge . . . Accordingly, we conclude that the Respondent's discharge of Davis did not violate the Act").

In *HCA/Portsmouth* the Board held that an employer did not violate NLRA Section 8(a)(1) by interrogating, suspending, and discharging an employee after she "maliciously spread[] false rumors" about a supervisor who had criticized the employee's absenteeism, in order to have that supervisor fired. *Id.* at 919. The employee's conduct, the Board reasoned, "removed the Act's protection from her attempts to initiate concerted activities" with coworkers. *Id.* Simply put, the Board has said, a legitimate investigation of unprotected conduct "would not reasonably tend to restrain, coerce, or interfere with rights guaranteed by the [NLRA]." *Ogihara Am. Corp.*, 347 N.L.R.B. 110, 114 (2006).

Thus, under the Board's own consistent precedents, an interrogation may be "peripherally related to Union activities," so long as it is "directed not at that protected and concerted activity" but at unprotected activity such as "picket line misconduct." *St. Louis Comprehensive Neighborhood Health Ctr., Inc.*, 248 N.L.R.B. 1078, 1078, 1087 (1980). *See also K.O. Steel Foundry & Machine, a Div. of TIC United Corp.*, 340 N.L.R.B. 1295, 1298 (2003) (affirming ALJ conclusion that even if employer's executive asked employee who had photographed sensitive area of company facility whether he did so at union's behest, such question should not violate NLRA Section 8(a)(1); employer had substantial interest in shielding its manufacturing processes from industrial espionage, so photographing was unprotected activity, and questions about

employees' unprotected activity have no potential to interfere with exercise of statutory rights).

Most recently, in *Preferred Building Services*, *Inc.*, 366 N.L.R.B. No. 159, slip op. at 1 (2018),[6] an ALJ had determined that employers committed multiple independent violations of NLRA Section 8(a)(1) against employees, including surveillance, threatening discharges, lawsuits, and other reprisals, and – most pertinently here, interrogations. But after concluding that these events occurred in the course of what was unlawful "secondary picketing," the Board dismissed the allegations. *Id.*, slip op. at 4-7. It concluded that because the employees had engaged in unlawful activity they "lost the protection of the Act"; and as "the unfair labor practices alleged," including interrogating employees, all "occurred in reaction" to the employees' unprotected picketing activity, those reactions did not

[6] The Board issued its decision in *Preferred Building Services* on August 28, 2018 (*i.e.*, 67 days after its decision in this case). One week after issuance of the *Preferred Building Services* decision, on September 5, 2018, TWC moved the NLRB to reconsider its ruling on the blockade-related "interrogations," pointing out that the instant ruling was squarely inconsistent with the decision in *Preferred Building Services.* Under NLRB rules, a motion for reconsideration ordinarily must be filed within 28 days of the objected-to action, at least in the absence of "excusable neglect." *See* NLRB Rules and Regulations § 102.48(c). Obviously, it was impossible here for TWC to meet that time limit, given that *Preferred Building Services* was not decided until 67 days after the NLRB's decision in the instant case. Accordingly, in its motion TWC certified that "[b]ecause the Board issued the *Preferred Building Services* decision on August 28, 2018, sixty-seven days after its Decision and Order in the present case, [TWC] was unable to file the original Motion for Reconsideration in this case, which relies upon the *Preferred Building Services* decision, within the Board's usual, twenty-eight-day time for filing such a motion." Nevertheless, on October 22, 2018, the NLRB Executive Secretary remarkably refused to allow TWC to file its motion, concluding that the Company's failure to predict and respond to the *Preferred Building Services* decision within 28 days of the Board's TWC decision (*i.e.*, 39 days *before* the *Preferred Building Services* decision was actually issued) did not "rise to the level of excusable neglect." Needless to say, the NLRB's refusal to consider TWC's motion in these circumstances was entirely inexplicable.

violate the NLRA. *Id.*, slip op. at 1, 7. The Board unequivocally concluded that none of the complaint allegations could stand, including the independent Section 8(a)(1) allegations, since all concerned the employers' response and reactions to the employees' unprotected conduct in picketing at their workplace. *Id.* The Board imposed no qualification on this rule; instead, it simply indicated that to be lawful, questioning must simply be a "reaction" to an unprotected event.

In dismissing the complaint in *Preferred Building Services*, the Board particularly relied upon *Martel Construction*, 302 N.L.R.B. 522, 522 (1991), in which the Board concluded that if employees had engaged in unprotected conduct, then "not all elements of the alleged 8(a)(1) and (3) violations would have been established." *Preferred Building Services* also relies upon *Rapid Armored Truck Corp.*, 281 N.L.R.B. 371, 382 (1986), where the Board stated that because employees had engaged in unprotected conduct, "it follows that the additional alleged unfair labor practices of Respondent, all of which occurred as a result of illegal picketing, and without which the alleged unfair labor practices would not have occurred, must be dismissed."

In sum, *Preferred Building Services* clearly stands for the proposition that employer conduct, such as an alleged interrogation, that occurs in response or reaction to an employee's unprotected activity does not violate the Act. Unquestionably, that is precisely what occurred in this case.

No federal court opinion states anything contrary to these Board decisions. And notably, nothing in Board or federal court case law states that an employer can question its employees about their own unprotected and unlawful conduct, but that it *cannot* ask the types of questions the Board found to constitute coercive interrogation here – questions about *other employees'* unprotected conduct, or about how and when employees came to learn about an unlawful event, and from whom. Certainly the Board's own cited authorities do not support the fine parsing that it demands in the present case. (*See* SPA 4, n.19 & n.20.)

While consistent Board case law demonstrates that TWC's questioning was lawful, none of the cases upon which the Board purported to rely supports the opposite conclusion. For example, the Board's opinion cites *St. Francis Regional Medical Center*, 363 N.L.R.B. No. 69, slip op. at n.2 (2015), but that case is obviously distinguishable: the Board there agreed with an ALJ that the employer violated Section 8(a)(1) by questioning a *union shop steward* about *her own investigation* into a potential *union grievance*, and threatening her with discipline if she failed to aid the company in its own investigation of other employees involved in the same matter. The Board's warning that even questioning about unprotected misconduct must be narrowly tailored to the facts "surrounding" that misconduct must be read in light of those circumstances, and the employer's flagrant intrusion into a union's internal activities. Thus *St. Francis* is critically inapposite.

Strangely, the Board's opinion also cites *Fresh and Easy Neighborhood Market, Inc.*, 361 N.L.R.B. 151, 159 (2014), wherein the Board found that a manager's questioning of an employee about *what had motivated her* to collect statements from her coworkers was in fact narrowly tailored to allow a "legitimate investigation" into an allegation of alleged unlawful conduct, and "a reasonable employee viewing [the manager's] actions in context would recognize that she was legitimately trying to gain a full picture of the events as part of her investigation." The questioning in the instant case was comparable in scope, and similarly designed to allow TWC to get the full picture of its employees' seemingly unlawful conduct and what had motivated it.

Most surprisingly, the Board's opinion last cites *Alton Box Board Co.*, 155 N.L.R.B. 1025, 1041 (1965). In that case, like here, the union was suspected of fomenting a walkout in violation of the parties' collectively bargained no-strike provision, following which the company investigated who was responsible for the walkout. The Board affirmed the ALJ's conclusion that management legitimately questioned employees – even without a union representative present – about the cause of the event, asking each "a series of questions as to when and *from whom he had first heard* that the shift would terminate early, whether anyone had stated that everybody was going home early, the substance of his conversations with the foreman and other employees (if any) concerning this matter." *Id.* at 1031-32.

This questioning of employees "to ascertain the extent of implication in, and responsibility for, the illegal walkout, by other employees," the ALJ concluded (and Board affirmed), "did not constitute restraint and coercion in violation of Section 8(a)(1) of the Act." *Id.* at 1042. That is exactly what TWC did here: it asked employees questions about when and from whom they heard about an unlawful strike.

In short, neither the three cases cited by the Board, nor any other authorities, demonstrate (or even suggest) that TWC could not ask employees seen standing in the street blocking traffic during work hours (particularly employees not even scheduled to work that day) why they did it, who told them about it, how they got there, and what other employees were involved in the unlawfulness. The Board certainly offers no authority – and there is none – to support its assertion that once TWC "established specifically what had happened" and "identified by the same means many of the employees who participated in the event," it had "no need to inquire into the activity of any employees prior to the event, except . . . specifically to identify the additional individuals who were actual participants." (SPA 4-5.)

This is just the sort of arbitrary departure from its own prior interpretations of the NLRA that, this Court has recognized, exceeds the bounds of the Board's discretion and should not be enforced. *See, e.g.*, *Long Island Head Start Child Dev. Servs. v. NLRB*, 460 F.3d 254, 260 (2d Cir. 2006) ("If the NLRB wishes to

adopt such a rule or presumption, it must explain its logic. The caselaw cited in the NLRB decision reflects a different policy logic than the rule proposed on appeal," and [b]ecause the Board has failed to present either a well-reasoned explanation for its rule or an analysis of all relevant issues, the NLRB's decision does not satisfy the *State Farm* requirements for reasoned agency decision making."); *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 196 (2d Cir. 2006) (vacating Board decision that had "no apparent basis," where Board "offered no expertise-based analysis," and "failed to acknowledge the natural and logical implications of the facts it credited and the analytic framework it adopted"); *and Serv. Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435, 449 (2d Cir. 2011) (where "the Board has long treated a unit limited to a single facility as presumptively appropriate," and employer's employees "all worked at a single (and separate) facility," this Court could "see no reason why the Board – consistent with well-established policy – should not have presumed, therefore, that those employees constituted an appropriate bargaining unit").

In accordance with the Board's own holding in *Preferred Building Services*, TWC was entitled to inquire into all aspects of its employees' unprotected conduct without offending the NLRA. Only had its questions strayed beyond the scope of the unprotected mass picket could they have violated the Act – but that did not happen. As discussed, TWC asked employees "who told you" *about the April 2,*

2014 event, "when did you receive notification" *about the April 2, 2014 event*, and "how was *this event* communicated to you?" (SPA 4, 5.) And yet, the Board indicates that such investigative efforts were impermissible – because TWC's inquiry was instead "required to focus closely on the unprotected misconduct." (SPA 4.)

In essence, the Board's notion is that TWC had to strictly limit its questions to what occurred in the hour and a half in which its employees actually stood in the middle of the street, and that once TWC had a reasonable hunch as to who had been blockading its facility, it could only ask them to identify others in the video – and could not inquire as to whether they had any excuse for their participation, or (alternatively) what other employees aided and abetted their violations of the law, or who told them about the unlawful blockade, when that happened, and how.

The narrow scope of the questioning the NLRB apparently would permit would have effectively prevented TWC from determining each employee's relative degree of fault or culpability for the unlawful mass picketing, which is something that the Board has long entitled (and encouraged) an employer to do. *See Alton Box Board Co.*, 155 N.L.R.B. at 1041 n.53 (affirming ALJ, whose opinion notes that "we operate in a field of law where … differences in degree make for differences in result," and cites "cases in which the question whether or not employees guilty of misconduct on the picket line (or in conducting other protected

activity) forfeit statutory protection, turns on the degree of their misconduct.") (internal quotations and citations omitted). Unsurprisingly, no authority actually supports the NLRB's present attempt to impose an outlandishly circumscribed range of questions about flagrantly unlawful conduct.

In sum, as the NLRB's Regional Director originally concluded, TWC's employee suspensions "were based on the Employer's investigation into and assessment of the level [of] employees' culpability for alleged misconduct, rather than on the level of employees' Section 7 protected activity." (A30-31.) Thus, that investigation was warranted and appropriate – and helped ensure that TWC did not commit any unfair labor practice. Because TWC's challenged actions were, self-evidently, "reactions to unprotected conduct," they cannot constitute an unfair labor practice or NLRA violation under the Board's own recent decision in *Preferred Maintenance*. Since the Board's conclusion cannot be squared with its own law, its order should not be enforced.

CONCLUSION

For the foregoing reasons, Petitioner/Cross-Respondent Time Warner Cable of New York City LLC respectfully requests that this Court reject and deny enforcement to that part of the National Labor Relations Board's Decision and Order holding that Time Warner Cable of New York City LLC violated Section 8(a)(1) of the NLRA by coercively interrogating its employees.

Dated: New York, New York
February 15, 2019

KAUFF McGUIRE & MARGOLIS LLP

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Certificate of Compliance

Daniel S. Kirschbaum, an attorney duly admitted to practice law in the state of New York and before this Court, hereby certifies on this 15th day of February, 2019 that in compliance with Fed. R. App. P. 32(a)(5) & (7), the Microsoft Word word-processing program on which this brief was drafted determined that this brief contains 6,205 words and (a) the typeface used is Times New Roman, (b) the point size is 14, and (c) the line spacing is double.

/s/ Daniel S. Kirschbaum
Daniel S. Kirschbaum

Special Appendix

SPECIAL APPENDIX
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Time Warner Cable New York City, LLC *and* Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO. Case 02–CA–126860

June 22, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On June 14, 2016, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel, the Charging Party, and the Respondent each filed exceptions, supporting briefs, answering briefs, and reply briefs. The General Counsel also filed a motion to expedite decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings and findings only to the extent consistent with this Decision and Order.

The primary issue in this case is whether the Respondent lawfully suspended four employees for participating in a demonstration outside the Respondent's facility on April 2, 2014. The General Counsel alleges that these suspensions violated Section 8(a)(3) and (1) of the Act. That issue hinges on whether the demonstration, and the employees' participation in it, constituted protected concerted activity under Section 7 of the Act. For the reasons explained below, and in the particular circumstances of this case, we agree with the Respondent that the employees participated in unprotected activity and that the Respondent was legally free to discipline them for doing so. Accordingly, we find that their suspensions did not violate the Act.[2]

[1] The motion to expedite, by its terms, was rendered moot by the issuance of a summary order by the United States Court of Appeals for the Second Circuit in *Time Warner Cable of New York City LLC v. IBEW, AFL–CIO, Local Union No. 3*, 684 Fed. Appx. 68 (2d Cir. 2017), affirming *Time Warner Cable of New York City LLC v. IBEW, AFL–CIO, Local Union No. 3*, 2016 WL 1043049 (E.D.N.Y. 2016). On April 8, 2016, the Board denied the Respondent's motion for summary judgment.

[2] Because the parties dispute whether they have an arbitration procedure in force, and the Respondent has indicated that it would oppose the refiling of the Union's grievance contesting the discipline based on the assertion that the Union earlier withdrew it with prejudice, we reject the Respondent's argument that the Board should defer this case to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971).

For reasons explained below, we affirm the judge's finding that the Respondent unlawfully interrogated employees who participated in the demonstration.

I. THE SUSPENSIONS

A.

The Respondent operates a number of facilities in New York City and New Jersey, including the one at issue located on Paidge Avenue in Brooklyn. That facility provides telephone and other electronic services to customers in southern Manhattan. Its staff includes technicians who make service calls and "foremen" to whom those technicians report. The Union represents the technicians and the foremen in a single multi-facility unit.[3] The parties' most recent regional collective-bargaining agreement expired on March 31, 2013.[4]

On April 1, 2014, the Respondent issued 2-day suspensions to several foremen at Paidge Avenue, including two of the alleged discriminatees in this case—Ralf Anderson and Frank Tsavaris—for violating a new requirement that they carry tools at work. Anderson and Tsavaris informed Derek Jordan, the Union's business agent, of their suspensions, and also that no shop steward was present when Anderson received his suspension. Jordan and other union representatives then called a "safety meeting" for unit members outside the facility for the next morning.

Shortly before 6:30 a.m. on April 2, Jordan positioned his car outside the facility in the middle of Paidge Avenue, perpendicular to traffic. By 6:33 a.m., at Jordan's direction, six employees had similarly put their cars in adjacent positions in front of the facility's vehicular access points, also blocking the street. The effect was to prevent vehicles from entering the block or entering the facility, and also to prevent the Respondent's service trucks from departing for work assignments. There is no dispute that this obstruction caused a "ripple effect" of delayed or missed service appointments for the rest of the day.

Over the next hour, about 50 employees, many of whom were scheduled to start work between 6:30 and 8 a.m., gathered on foot around the cars blocking the street. During that period, Jordan and other union representatives who were present handed out fliers on workplace safety and *Weingarten* rights. The participating employees remained in that location until about 7:30 a.m., when Jordan gathered the participants around him, still in the middle of the street, and addressed them on the same

[3] Although three of the four alleged discriminatees were classified by the Respondent as "foremen," there is no longer any contention that they were supervisors within the meaning of the Act.

[4] As the Board has already found, although the parties attempted to negotiate a successor contract, they failed to reach a complete agreement. See *Local 3, IBEW (Time Warner Cable NYC)*, 363 NLRB No. 30 (2015).

topics. The gathering broke up at about 8 a.m., and the blocking cars were removed.[5]

Anderson, Tsavaris and the other two alleged discriminatees (Diana Cabrera and Azeam Ali) were not scheduled to work at the time of the "safety meeting." All four, however, had been informed in advance that the meeting had been scheduled and were among those who came to the event.

The Respondent was able to identify several of the employees who were present at the car blockage, including the four alleged discriminatees, from video taken by its external surveillance cameras. As further discussed below, those employees were summoned to interviews by management a few weeks later and questioned about their involvement in the event. On May 22, 2014, the Respondent issued 2-week suspensions to seven of the employees interviewed, including the four alleged discriminatees.[6]

B.

The Respondent initiated a grievance/arbitration proceeding against the Union for damages and other relief, contending that the April 2 demonstration violated the no-strike clause in the parties' collective-bargaining agreement, which prohibited any "cessation or stop of work, service or employment." The parties voluntarily agreed to submit this question to arbitration.[7]

On December 12, 2014, an arbitrator found that the Union's "'safety meeting' was a pretext"; that "the manner in which the meeting was conducted impeded ready access to the Company's Pai[d]ge Avenue facility for all employees seeking to report to work [and] effectively and materially impeded the Company's normal business operations"; that "[t]he timing of the Union meeting in order to involve bargaining unit employees and the conduct of this meeting until long past their scheduled start times exacerbated the impact on the Company's installation and service operations"; and that by this action the Union violated the no-strike clause.[8] The arbitrator's decision was subsequently confirmed and enforced by a federal district court and by the United States Court of Appeals for the Second Circuit.[9]

C.

In the Board proceeding, the judge discredited Business Agent Jordan's testimony that the April 2 gathering was a "safety meeting." The judge found (as did the arbitrator) that Jordan "orchestrated a work stoppage by positioning vehicles in the middle of the street and instructing employees to gather there in order to impede company operations commencing with the 7 and 7:30 a.m. shifts."

The judge also found "no credited evidence" that the four alleged discriminatees knew beforehand that Jordan planned a work stoppage or that the "safety meeting" would block ingress and egress to the Respondent's facility. The judge further found that for an hour after the blocking cars were placed in position, employees, including the alleged discriminatees, arrived on the scene and mingled around and between those cars. They then concentrated into a smaller space on the street to hear Jordan and other union officials speak. The employees dispersed only when the cars were removed.

The judge concluded that the alleged discriminatees "went to the gathering on Paidge Street for a union meeting relating to working conditions, disciplinary actions, grievances and employees' *Weingarten* rights," and that they "were part of the group of employees who gathered in front of the Company's facility after the blockade was in place." With respect to the gathering, however, the judge reasoned that the employees "simply stood in the crowd and had no involvement in constructing the vehicular blockade" of the Respondent's facility. Accordingly, in the judge's view, the alleged discriminatees did nothing, physically or verbally, that contributed to the blocking of access to the facility. On this ground, he found that the employees engaged only in concerted activity protected under Section 7, and that their suspensions by the Respondent were consequently unlawful.

[5] At some point during the blockage, the Respondent's security office called the police, and officers came to the scene. Jordan assured them the gathering would soon disperse, and there was no additional police involvement.

[6] The alleged discriminatees and approximately 34 other employees also received final written warnings. The complaint does not allege that any of these warnings was unlawful.

[7] In the arbitration proceeding, the Union challenged the arbitrator's jurisdiction on the ground that the no-strike and arbitration clauses in the parties' expired collective-bargaining agreement had not been extended to the time of the April 2 demonstration. Without ruling on whether those clauses had been extended, however, the arbitrator found that he had independent jurisdiction, from the parties' initial joint submission of the grievance to him, to make a binding determination of whether the demonstration violated *the terms* of the no-strike clause. The arbitrator's determination that the parties had voluntarily agreed to submit this specific question to arbitration was subsequently affirmed by both the District Court and the Court of Appeals. *Time Warner Cable of New York City LLC v. IBEW, AFL–CIO, Local Union No. 3*, 684 Fed. Appx. 68 (2d Cir. 2017), affirming *Time Warner Cable of New York City LLC v. IBEW, AFL–CIO, Local Union No. 3*, 2016 WL 1043049 (E.D.N.Y. 2016).

While the Board intervened in that litigation in support of the Union's contention that the no-strike and arbitration clauses had not been extended, given that neither the arbitrator nor the reviewing courts reached that question, we need not address it here.

[8] On November 30, 2015, the arbitrator issued a final award of over $19,000 in damages to the Respondent, payable by the Union.

[9] See fn. 7.

D.

For the following reasons, we disagree with the judge's analysis. It is well established that "employees who engage in conduct that is unlawful, either under the Act or for reasons extrinsic to it, or who pursue ends or employ means that are incompatible with the Act, are engaged in unprotected activity, and thus can be discharged therefor." *Correctional Medical Services*, 349 NLRB 1198, 1201 (2007), rev. granted on other grounds sub nom. *Civil Service Employees Assn., Local 1000, AFSCME v. NLRB*, 569 F.3d 88 (2d Cir. 2009). One example of such unprotected conduct is participation in a group action that violates a no-strike clause. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).[10]

As described above, the parties voluntarily agreed to submit to an arbitrator the question whether the events of April 2 violated the terms of the no-strike clause. The arbitrator found that the Union, by blocking the entrances to the Respondent's facility during the April 2 demonstration in a manner that "impeded ready access" and "effectively and materially impeded the Company's normal business operations," violated the terms of the parties' no-strike clause, which was not limited to simply withholding one's labor when scheduled to work. The district and appellate courts subsequently confirmed and enforced that decision in a proceeding in which the Board intervened.[11]

Given the particular procedural history of this matter, we treat it as established that the April 2 demonstration violated the parties' no-strike clause. Thus, the demonstration never was protected by the Act. It follows that employees who participated in that demonstration, regardless of the nature of their participation, were themselves engaged in unprotected activity and were subject to discipline.[12]

On the facts presented here we find, contrary to the judge, that the alleged discriminatees in this case were among the participants in the April 2 demonstration. The judge reasoned that the alleged discriminatees "simply stood in the crowd" and did nothing to contribute to the blockage. This line of reasoning assumes that the employees' mere participation in the demonstration could not have subjected them to discipline. But that assumption is incorrect in the circumstances of this case.[13]

The record shows that the employees became aware, no later than their arrival at the Respondent's facility, that the Union's arrangement of cars in the street was blocking access to the facility, as well as the street adjoining it. Further, it was clear that other employees had joined the blockage by gathering closely among and around those cars.[14] The alleged discriminatees then joined that gathering and similarly milled among the blocking cars. They remained in that strategic location

[10] There are potential exceptions to this basic rule, such as where employees violate a no-strike clause to protest their employer's serious unfair labor practices. See *Mastro Plastics*, supra, 350 U.S. at 280–282; *Arlan's Department Store of Michigan*, 133 NLRB 802 (1961). But no exception is implicated by the present case.

We also observe that employees engage in unprotected misconduct when they block access to their employer's facility. E.g., *International Brotherhood of Electrical Workers Local 98 (Tri-M Group)*, 350 NLRB 1104, 1107–1108 (2007), enfd. 317 Fed.Appx. 269 (3d Cir. 2009), and authorities cited therein; *Tube Craft*, 287 NLRB 491, 492–493 (1987). Cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939) (where employees occupied employer's buildings "in order to prevent their use by the employer in a lawful manner . . . they took a position outside the protection of the statute"). This is true even where a blockage does not involve actual violence, or is brief in time. *Tri-M Group*, supra, 350 NLRB at 1107–1108; *Metal Polishers Local 67*, 200 NLRB 335, 336 fn. 10 (1972); *Longshoremen & Warehousemen Local 6 (Sunset Line & Twine)*, 79 NLRB 1487, 1506 (1948). But given the arbitrator's and the courts' findings that the April 2 demonstration violated the parties' no-strike clause, as explained below, we need not rely on these cases here.

[11] The Second Circuit, in rejecting the Union's argument that the April 2 demonstration did not violate the terms of the no-strike clause and confirming the arbitrator's decision, noted that "[t]he arbitrator found . . . that union members were not in fact orderly because they had blocked vehicular access to Time Warner's facility." *Time Warner Cable of New York City v. IBEW Local. 3*, supra, 684 Fed Appx. at 71–72 (2d Cir. 2017), quoting *Tri-M Group*, supra, 350 NLRB at 1107.

[12] Contrary to our dissenting colleague's assertion, this conclusion is not premised on a finding that "a no-strike clause was in effect" on April 2 by virtue of a previous agreement by the parties to extend, in whole or in part, their collective-bargaining agreement. Rather, we are simply acknowledging that we do not write on a clean slate in this case. The parties themselves specifically asked the arbitrator to determine whether the April 2 demonstration violated the terms of the no-strike clause. We merely follow the arbitrator's determination, later enforced by the reviewing courts, that the demonstration did violate that no-strike clause, which means it never enjoyed the protection of the Act. While the Board is not bound by the arbitrator's determination, as our dissenting colleague emphasizes, we are not barred from holding the parties to it in the particular circumstances of this case.

We also observe that the Respondent's argument that the four alleged discriminatees' actions were unprotected is similarly based on their having "aided and abetted" the mass blockage of access to the Respondent's facility, thereby violating the parties' no-strike clause. The Respondent does not contend that the alleged discriminatees were strikers as a matter of Board law. By the same token, our adoption of the arbitrator's and the courts' finding that the blockage violated the no-strike clause and was therefore unprotected is not a finding that these four employees were strikers.

[13] As a result, we need not pass on the question whether the Respondent lawfully could have disciplined the employees even in the absence of their participation in the April 2 demonstration. Likewise, we find it unnecessary to rely on the judge's distinction between "active" and "passive" participation, or the cases he cites involving an employee's loss of protection due to his own misconduct.

[14] It is thus irrelevant that, as the judge found, the alleged discriminatees were not shown to have known the nature of the Union's unprotected demonstration before they arrived at the scene.

with the other participating employees until the termination of the demonstration, which lasted 90 minutes. In these circumstances, we have little trouble finding that the alleged discriminatees participated in the Union's unprotected demonstration, thereby exposing themselves to discipline.[15]

The General Counsel, as did the judge, emphasizes that the initial blockage of access to the Respondent's facility was imposed by Business Agent Jordan and the drivers of the blocking cars, that the alleged discriminatees arrived after the cars were in place, and that none of the alleged discriminatees was shown to have engaged in any violent or disruptive action. He further attempts to distinguish the alleged discriminatees' actions from the direct, face-to-face blocking of access that occurred in some other cases in which the Board found that employees' misconduct deprived them of the Act's protection while they were *initially* engaged in protected activity.[16] These arguments, however, fail to come to terms with the fact that the alleged discriminatees made themselves part of what was—in the particular circumstances of this case—an unprotected demonstration and were disciplined for that reason. Whether the alleged discriminatees initiated that demonstration, whether they acted peacefully, and whether their participation was necessary to effectively block access to the facility, is all beside the point. What matters, rather, is that the employees were not mere bystanders and that the activity for which they were disciplined—participation in a demonstration that, because it violated the no-strike clause, was never protected—was not itself protected concerted activity under the Act.[17]

We therefore conclude that the Respondent did not violate the Act by suspending the employees.

II. THE INTERROGATIONS

As noted above, the Respondent summoned the employees whom it had identified by video as being present at the April 2 event to investigatory interviews. In these interviews, the employees were asked a series of questions from a prepared script. The questions included: "Who told you about this gathering?"; "When did you receive notification of the gathering?"; "How was this event communicated to you?"; and, "What were you told about the reason for the protest?" Employees were also asked whether they had "reviewed the CBA," and whether they were familiar with its no-strike clause, which the Respondent read aloud to them.

If an employee said she was not told about the event or asked to participate, she was asked in addition, "[w]hy did you remain outside?" Employees who were not scheduled to work at the time of the incident (including the four alleged discriminatees) were also asked, "Why did you come to work? Did anyone in management direct you to come to work?" The foremen and the steward who had been suspended on April 1 were similarly asked why they had "come to work."[18] The judge found all of the above questions unlawfully coercive.

The Respondent was investigating a demonstration at its facility which, as has been established, was unprotected. The Respondent therefore had the right to inquire about the employees' and the Union's participation in that event to a greater extent than if no unprotected conduct had occurred or if it were interviewing employees who clearly were only bystanders.[19] That inquiry, however, also had the potential to intrude into protected employee activity. The Respondent's inquiry was accordingly required to focus closely on the unprotected misconduct and to minimize intrusion into Section 7 activity.[20]

Moreover, the Respondent, through its video, had already established specifically what had happened, and it had identified by the same means many of the employees who participated in the event. There was therefore no need for the Respondent to inquire into the activity of any employees prior to the event, except (as the judge recognized) specifically to identify the additional indi-

[15] We reject the contention of the General Counsel and the Union that the Respondent's discipline of the alleged discriminatees should be analyzed, and found unlawful, under the framework established in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). That analytical framework applies where an employer mistakenly disciplines employees for misconduct that purportedly occurred in the course of their *protected* activity and the employer's mistake was of fact, not of law. *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB 308, 313 fn. 20 (2014), affd. 629 Fed. Appx. 33 (2d Cir. 2015). Those circumstances are absent here. Employees are protected under *Burnup & Sims* only where they are shown not to have committed the purported misconduct for which they were disciplined.

[16] See, e.g., *Unite Here! Local 5 (Aqua-Aston Hospitality, LLC, d/b/a Waikiki Beach Hotel and Hotel Renew*), 365 NLRB No. 169 (2017), and authorities cited therein.

[17] That fact distinguishes this case from *Altorfer Machinery Co.*, 332 NLRB 130 (2000), and *Detroit Newspapers*, 342 NLRB 223 (2004), cited by our dissenting colleague. In both of those cases, employees were engaged in a lawful strike and lawful strike activities, and some employees were found not to have lost statutory protection simply by being present on occasions when other strikers committed *individual* acts of misconduct. Here, by contrast, the group activity was unprotected from the outset, the alleged discriminatees deliberately joined it, and they were disciplined accordingly.

[18] The Respondent confirmed at the hearing that the question "Why did you come to work?" meant "Why did you come to the area of the Paidge Avenue location?"

[19] E.g., *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at fn. 2 (2015); *Fresh & Easy Neighborhood Market*, 361 NLRB 151. 159 (2014); *Alton Box Board Co.*, 155 NLRB 1025, 1041 (1965).

[20] Id.

viduals who were actual participants in the demonstration.[21]

In this light, the judge was correct that at least three of the Respondent's questions—"Who told you about this gathering?" "When did you receive notification of the gathering?" "How was this event communicated to you?"—were unlawfully coercive under Section 8(a)(1). These questions intruded into Section 7 communications between employees without directly seeking identification of other individuals who were present at and participated in the unlawful demonstration. Because the remedy for the additional questions posed by the Respondent that the judge found unlawful – a cease-and-desist prohibition of such questions, included in the notice-posting – would be essentially cumulative of the remedy for the questions we have found unlawful, we need not reach the legality of those additional questions.

ORDER

IT IS ORDERED that the Respondent, Time Warner Cable New York City, LLC, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2014.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 22, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting in part.

I disagree with my colleagues' decision to reverse the judge and dismiss the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Ralf Anderson, Frank Tsavaris, Diana Cabrera, and Azeam Ali for 2 weeks each. The four employees were clearly engaged in protected conduct when attending a union meeting on April 2, 2014, concerning the Respondent's discipline and change in work rules. And simply put, the four employees did not commit the acts of which they were accused, i.e., instigating and participating in an illegal work stoppage in violation of a collective-bargaining agreement no-strike clause and interfering with ingress to and egress from the Respondent's facility.

Contrary to the conclusion of my colleagues, the employees did not act in violation of a no-strike clause because the contract containing that no-strike clause had expired. In fact, the Board previously held that these very parties had not agreed to a successor contract by the time of the events in question. See *Electrical Workers IBEW Local 3 (Time Warner Cable)*, 363 NLRB No. 30, slip op. at 16 (2015). It is well-settled that a no-strike clause does not survive an expired contract. See *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 3–4 (2015). Even if sincerely held, the Respondent's mistaken belief—that on April 2, there was in effect a valid

[21] There are no exceptions to the judge's findings that the Respondent could lawfully inquire as to "the perpetrators of the vehicular blockade," and could ask questions to confirm "the employee's presence in front of the facility on April 2, their arrival time, how they got there, whether they drove a company vehicle, and where they parked."

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

collective-bargaining agreement containing a no-strike clause—does not insulate it from liability. See *NLRB v. Burnup and Sims, Inc.*, 379 U.S. 21, 23–24 (1964) ("A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith.")

My colleagues nevertheless treat it as established—for purposes of evaluating the legality of the four suspensions at issue here—that the April 2 gathering violated the parties' no-strike clause based on an arbitration decision that awarded the Respondent damages caused by the Union's April 2 conduct. I respectfully disagree. In the first place, the arbitrator's decision that was confirmed by the district court was not premised on the existence of a collective-bargaining agreement containing a no-strike clause. Rather, as the district court explained, the arbitrator merely assumed for purposes of that specific arbitration that a no-strike clause was in effect, and the arbitrator was entitled to do so because the parties had specifically agreed to arbitrate (via a separate agreement) the question whether the no-strike clause had been breached by the union. And the district court enforced the award on the basis of that specific agreement to arbitrate the Union's liability, not on the basis of a collective-bargaining agreement containing a no-strike clause. See *Time Warner Cable of New York City LLC v. IBEW, AFL–CIO, Local Union No. 3*, 170 F.Supp.3d 392, 399, 418–419 (E.D.N.Y. 2016), affd. 684 Fed.Appx. 68 (2d Cir. 2017).[1]

The district court's decision also makes clear that the Board and the arbitrator were free to reach their own separate and even "inconsistent[]" conclusions. Id. at 399, 418–419.[2] And the arbitrator simply did not address the legality of the suspensions. Indeed, the district court noted that the case involving the four discriminatees is a different case involving different parties and a different issue before a different adjudicatory authority. Id. at 418. In short, it is my colleagues, not me, who are attempting to wipe the slate clean of both the Board's prior holding—that the parties had not reached a successor collective-bargaining agreement at the time of the events in question—and the district court's acknowledgement that the Board and the arbitrator were free to reach inconsistent conclusions regarding whether a no-strike clause was in effect at the time of the events in question.

Nor were the four employees guilty of the other charged misconduct. To be sure vehicles were parked in the middle of the street in front of the Respondent's facility in such a manner as to block ingress and egress. However, that conduct is not fairly chargeable to the four employees. It is undisputed that they did not park the vehicles that obstructed the Respondent's operations, request that the vehicles be parked in that location, or even know the vehicles would be situated there when they learned of the union's meeting. Nor did they contribute to the obstruction. As the judge found, the four employees were passive participants whom the Respondent knew "simply stood in the crowd and had no involvement in constructing the vehicular blockade of the [Respondent]'s facility and operations." Cf., *Altorfer Machinery Co.*, 332 NLRB 130, 132, 141–142, 148 (2000) (disciplined employee's mere presence at scene of misconduct does not establish that the employee was guilty of engaging in the statutorily-recognized misconduct that actually did occur that day); *Detroit Newspapers*, 342 NLRB 223, 230–231 (2004) (though present at the scene, discharged employee was not guilty of the charged misconduct). Therefore, I agree with the judge that the Respondent unlawfully suspended employees

[1] See also id. at 418 (emphasis added in part):

> Under the magic of the broad federal arbitration statute, an arbitration may be specifically authorized by the parties to decide whether a *non-operative* no-strike clause has been violated, and to assess damages. *For the purposes of the specific arbitration,* the no-strike clause in the CBA, as well as the CBA itself, could be assumed to be operative by the arbitrator.

[2] See also id. at 418:

> According to Local 3 and the NLRB, the arbitrator's decision is unenforceable as against public policy because it is based on a no-strike provision included in a CBA that the NLRB concluded was not operative. ***
>
> Giving full effect to the NLRB's decision does not divest the arbitrator of jurisdiction. The separate, free-standing, valid, specific arbitration agreement expressly granted the arbitrator the authority to decide the dispute "*as if there were a more general agreement not to strike*." ***The arbitrator was not tasked with determining whether the CBA was valid. Neither of the two relevant NLRB proceedings have preclusive effect on the narrow, separate dispute that the parties in the instant case specifically submitted to arbitration:
>
> > THE COURT: [T]here may be inconsistencies in the decisions, but that is not a reason for my denying the enforceability of . . . *a separate decision on your part to go forward with an arbitration as if there were a contract, CBA, that you had signed*.
> > [. . .]
> > [T]he fact that another adjudicatory authority is making a decision involving different personnel, different parties, four workers, different from the one that the arbitrator decided, it does not bother me at all. I do not see any collateral estoppel problem.
>
> ***
>
> The award of the arbitrator for money damages based on the specific agreement to arbitrate does not violate public policy. It can be enforced with no disrespect for the NLRB decision.

Anderson, Tsavaris, Cabrera, and Ali for their attendance at the union meeting.

Accordingly, as to this issue, I respectfully dissent.

Dated, Washington, D.C. June 22, 2018

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights described above.

TIME WARNER CABLE NEW YORK CITY, LLC

The Board's decision can be found at www.nlrb.gov/case/02-CA-126860 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE., Washington, D.C. 20570, or by calling (202) 273–1940.

Allen M. Rose and *Joseph Luhrs, Esqs.,* for the General Counsel.

Kenneth A. Margolis, Esq. (Kauff McGuire & Margolis, LLP), of New York, New York, and *Kevin M. Smith, Esq. (Time Warner Cable),* of New York, New York, for the Respondent.

Robert T. McGovern, Esq. (Archer, Byington, Glennon & Levine, LLP), of Melville, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case arises out of union strike activity that occurred in front of Time Warner Cable New York City, LLC's (the Company) facility at Paidge Avenue in Brooklyn, New York, during the morning of April 2, 2014.[1] During its subsequent investigation, the Company questioned employees regarding their participation in the work stoppage and disciplined numerous employees. Most employees who were present received final warning letters. However, seven employees deemed to have engaged in the most serious misconduct received 2-week suspensions. Three were suspended because they engaged in active misconduct by constructing a vehicular blockade of company operations. The other four employees—Diana Cabrera, Azeam Ali, Ralf Anderson and Frank Tsavaris—were suspended because they were off duty at the time and had no legitimate reason to be at that location.

This case was tried in New York, New York, on April 11–13, 2016. Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO (the Union or Charging Party) filed and served the charge and amended charge on April 18 and August 19, 2014, respectively, and the General Counsel issued the second amended complaint on March 31, 2016. The complaint alleges that the Company's questioning of employees following the strike constituted coercive interrogation in violation of Section 8(a)(1) of the National Labor Relations Act[2] and that its suspensions of Cabrera, Ali, Anderson, and Tsavaris unlawfully discriminated against them in violation of Section 8(a)(3) because they engaged in protected union activity initiated by the Union.

The Company alleges that the four discriminatees did not engage in protected conduct because (1) at the time of the events in question, their actions contravened the no-strike provision in a collective-bargaining agreement (CBA), and (2) they participated in mass picketing that interfered with ingress to and egress from the Company's facility.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a domestic limited liability company, is engaged in providing cable television, telephone and high speed

[1] All dates are 2014 unless otherwise indicated.

[2] 29 U.S.C. §§ 158(a)(1), et seq.

internet services at its facility in Brooklyn, New York, where it annually derives gross revenues in excess of $100,000 and purchases and receives goods, supplies, and utilities valued in excess of $5000 directly from suppliers outside the State of New York. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company operates six divisions in the New York City metropolitan area: Northern Manhattan, Southern Manhattan, Brooklyn, Queens and Staten Island, New York, and Bergen County, New Jersey (collectively referred to as the six facilities or divisions). The Southern Manhattan Division, headquartered in an expansive facility located on Paidge Avenue in Brooklyn (the facility), provides service (television, internet, security, and telephone) to all of the Company's residential and commercial customers in Manhattan south of 86th Street. It houses dispatch, communications, technical operations (installation, service, and repair), construction, and survey and design personnel and equipment. The facility encompasses executive offices, an indoor garage, outside parking areas, a staff of over 600 (including various kinds of technicians, foremen, and managers) as well as a fleet of company vehicles. The facility is next door to a New York City Fire Department annex that houses large emergency vehicles.

B. The Collective-Bargaining Relationship With The Union

The Union has represented company employees at the six facilities for over 10 years. CBAs reached between the Company and Union in 2005 and 2009 were each accompanied by Riders specific to each facility and preceded by a comprehensive memorandum of agreement (MOU). The 2009 CBA expired on March 31, 2013. It contained, in pertinent part, a no-strike clause at section 31: "There shall be no cessation or stoppage of work, service or employment on the part of or the instance of either party, during the term of this agreement."

On January 3, 2013, prior to the commencement of bargaining over a successor CBA, a bargaining unit employee at one of the six locations filed a decertification petition with Region 22 seeking to decertify the Union as the collective-bargaining representative of employees at that facility. After a hearing, the Regional Director for Region 22 dismissed the petition on the ground that the most appropriate unit in the decertification context should have been a multi-location unit consisting of the six facilities. The Company did not contest that decision and subsequently agreed with the Union that all six facilities would be treated as one single bargaining unit.

C. Negotiations for a Successor Agreement

Thereafter, bargaining resumed and the parties executed an MOU on March 28, 2013 summarizing agreed-upon changes to the expiring CBA for all six facilities. The introduction stated that "the full text of the applicable changes will be incorporated in a new Collective Bargaining Agreement which shall become effective, upon ratification by the Union membership, scheduled for April 4, 2013."[3] The new CBAs were to be effective from April 1, 2013 to March 31, 2017. The employees at the six facilities ratified the MOUs in a single vote. There was no separate ratification vote, however, regarding the terms and conditions contained in the previous location specific Riders. The 2009–2013 Riders addressed standby procedures at all six facilities, but also included additional issues specific to four facilities: Staten Island facility—vacation, temporary employees and work performed by classification; Bergen facility—bargaining unit work, sick days, work schedules, journeyman and other designations; Northern Manhattan—double compensation for overtime work on weekends; Southern Manhattan—elimination of certain service and maintenance work, and dispatch department function.

Although the parties had not yet integrated the substance of the agreement embodied in the MOU into the standard CBA format covering employees at all six facilities, the Company implemented several changes contained in the MOU as of April 1, 2013. They included wages and increases in payments to the Union's annuity fund.

On May 14, 2013, the Company provided the Union with a draft of a successor CBA. The draft incorporated the identical provisions of the expired CBA, along with the changes set forth in the MOU provisions the six locations. None of identical provisions, which included the no-strike clause, were discussed during negotiations. Missing, however, were the facility specific Riders that accompanied previous CBAs.

On July 8, 2013, the Union informed the Company that the draft omitted the Riders and language pertaining to bonuses for electrical engineering degrees. After an exchange of communications disagreeing over whether the parties agreed to include these provisions in the successor agreement, the parties met again on September 9, 2013. The Company continued to maintain that it would not agree to include the Riders in the successor agreement. On that basis, the Union refused the Company's demand that it execute the draft successor agreement. After further negotiations in February and March 2014, the Company proposed revised versions of several Riders in a new successor contract. Several communications followed regarding the Company's omission of the electrical engineers provision and the Southern Manhattan Rider.

On March 31, after concluding that the Union would not sign any of the proposed CBAs sent to it by the Company, the Company filed an unfair labor practice charge alleging, pursuant to *H. J. Heinz Co. v. NLRB,* 311 U.S. 514 (1941), that the Union failed to execute a written agreement embodying the MOA.[4]

In a decision and recommended order, issued April 28, 2015, and adopted by the Board on October 29, 2015, Judge Steven Fish concluded that the Union did not violate Section 8(b)(3) by refusing to execute the successor CBA. He based that deci-

[3] The summary of changes included provisions addressing: the term of agreement; subcontracting and contracting out work; telephony deleted; workweeks, hours and shifts; overtime; holidays; annuity payments; social security contributions; education fund; wages rates and premium pay; journeymen rights; work performed by nonjourneymen; and payroll savings plan deleted.

[4] The Union also filed an 8(a)(5) and (1) charge arising out of the same transaction but that charge was dismissed by the Region.

sion on the insufficiency of evidence demonstrating that the parties reached a "meeting of the minds" on all substantive issues, or that the documents submitted by the Company to the Union for execution accurately incorporated any such agreement. *Electrical Workers IBEW* Local *3 (Time Warner Cable),* 363 NLRB No. 30, slip op. at 16 (2015).

In denying the Company's motion to reopen the record to admit posthearing evidence of grievances filed by the Union, which allegedly constituted admissions that the Union unlawfully refused to execute an agreed-upon contract, the Board noted:

> The Charging Party contends that this evidence demonstrates that the [Company] unlawfully refused to execute an agreed-upon contract. Contrary to the [Company's] contention, the [Union's] posthearing conduct shows only that the [Company] mistakenly believed that the parties had reached agreement on March 28, 2013. It does not bear on the relevant question of whether the parties reached a meeting of the minds regarding all material terms of their successor contract.
>
> The Board provided further clarification as to why the Union did not violate Section 8(b)(3) of the Act by refusing to execute the successor CBA:
>
> [W]e find it unnecessary to pass on the judge's finding that the Charging Party's inclusion of the South Manhattan Rider in the copy of the contract it attached to its Federal district court complaint alleging a violation of the contractual no-strike clause constituted an admission that the Rider was part of the parties' agreement.

D. Foremen Are Disciplined

On April 1, 1 day after it filed unfair labor practices against the Union, the Company issued 2-day suspensions to several foremen, including Anderson and Tsavaris, for refusing a company directive requiring them to take tools home at the end of their shifts. The directive was the subject of the grievance process set forth in the expired CBA. In addition, Phil Papale, a shop steward, was suspended for conduct while representing a foreman during the grievance process.

Shortly after their suspensions, Anderson and Tsavaris informed Derek Jordan, their union representative. Anderson also informed Jordan that a shop steward was not present when he was issued the suspension.[5] Jordan and other union representatives responded by calling for bargaining unit members to attend a "safety meeting" outside the facility the next morning.[6]

E. The Union Disrupts Company Operations On April 2

On a typical day in 2014, between 6:30 and 8 a.m. approximately 150 field technicians drove their personal vehicles to work, parked on a lot adjacent to the Paidge Avenue facility, entered the facility to receive assignments from their foremen, and then drove designated company vehicles out of the facility to customer service locations. In addition to dispatching vehicles from the warehouse and repairing them there, the Company also receives shipments of equipment and supplies at the facility.

As depicted by the Company's closed-circuit security camera video, at about 6:23 a.m. on April 2, 2014, Jordan arrived in front of the facility for the purpose of initiating a work stoppage or strike. Although there were available parking spots along the curb, he parked his vehicle perpendicular to the direction of traffic in the middle of Paidge Avenue.[7] Shortly thereafter, Jordan directed several Company employees to move their vehicles from parking spots and position them in similar fashion, perpendicular to traffic, in the middle of the street.[8] Over the next 10 minutes, six more vehicles parked in the middle of Paidge Avenue. The result was that, by 6:33 a.m., vehicles could no longer access or exit from the facility, including the main entrance, garage entrance and employee parking lot.[9]

By 7 a.m., about 50 employees gathered in between the vehicles positioned in the middle of the street. As they congregated, union representatives handed them fliers regarding work safety and *Weingarten* rights to representation during disciplinary interviews.[10] At about 7:30 a.m. Jordan motioned employees to gather around him in the middle of the street. He then proceeded to address employee safety concerns relating to the absence of their suspended foreman, as well as their *Weingarten* rights. The gathering broke up at about 8 a.m. and Paidge Avenue was reopened to vehicular traffic.[11]

Gregg Cory, the Company's area vice president for Southern Manhattan, was apprised immediately about the vehicles parked in the middle of the street. Cory called the Company's security office, which in turn called the police department. Police officers responded shortly thereafter and spoke with Jordan. He assured them that the crowd would soon disperse.

As a result of the impeded access to the facility, approximately 77 technicians on the 7 and 7:30 a.m. shifts were unable to access the facility or company vehicles in the adjacent parking lot. This further resulted in a half hour or a 1-hour delay (depending on the shift) before technicians' could leave the facility in order to make scheduled appointments. The disrup-

[5] GC Exh. 31, 33.

[6] Cabrera testified that the Union announced the "safety meeting" the previous day on social media. (Tr. 165.), while Tsavaris testified that he was notified about the meeting in an early morning call from his shop steward on April 2. (Tr. 189–190.) I found it peculiar that the 4 discriminatees would travel to Paidge Avenue on their day off for a safety meeting. Nevertheless, there is insufficient credible evidence to conclude that any of them knew beforehand that the Union planned a work stoppage.

[7] Jordan's denial that he precipitated a "job action" and merely convened a "safety meeting" in order "to get the workers to go back to work or to go to work," was not credible. Responding to the previous day's suspension of the foremen, he orchestrated a work stoppage by positioning vehicles in the middle of the street and instructing employees to gather there in order to impede company operations commencing with the 7 and 7:30 a.m. shifts. (Tr. 367–368, 370–371, 389–390).

[8] GC Exh. 20.

[9] GC Exh. 23A-B.

[10] Referring to the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975) affirming employees' rights to union representation at investigatory interviews.

[11] It is undisputed that Paidge Street was completely blocked off and a back-alley exit, which Corey used to return into the facility, was not previously used as an entrance by employees arriving for work or while working. (Tr. 229, 235–240, 248–249, 265–273, 384; GC Exh. 19–20, 23, 29; R. Exh. 6–7, 9–10.)

tion caused a ripple effect of delayed or missed appointments throughout the day.

Cabrera, Ali, Anderson, and Tsavaris were not scheduled to work at the time, but decided to attend the event. All were aware that the Union called a "safety meeting." Anderson arrived early after driving 55 miles from his home to Paidge Avenue, parked and took a nap. Ali also drove his vehicle from Suffolk County and even picked up a coworker to attend the meeting. Diana Cabrera learned about the event on social media and, although she usually commuted to work by train or taxi, she was given a ride to the event by a coworker.[12]

The gathering dispersed at approximately 8 a.m., enabling technicians on the 7 and 7:30 a.m. shifts to report to work and begin their shifts.

F. The District Court Action

In April 2014, the Company also sought injunctive relief in the United States District Court for the Eastern District of New York pursuant to Section 301 of the Labor Management Relations Act. The suit alleged the Union's violation of the no-strike clause in the contract in September 2013, March and April 2, 2014. After a 3-day hearing, Judge Jack Weinstein found that two of the incidents described in the complaint constituted a strike in violation of the no-strike clause:

> That was not a safety meeting . . . They blocked ingress and egress to that plant. There was a substantial delay in starting operations that day. I'm holding it was a strike. I don't want to get involved in any euphemisms.

Nevertheless, Judge Weinstein dismissed the petition on May 5, on the ground that the disputes involved were subject to arbitration, were in the process of being arbitrated and there was no evidence or likelihood of further violations of the no-strike clauses.

G. Arbitration Brought By The Company

On April 17, the Company initiated an arbitration proceeding against the Union seeking damages and other relief for the events on April 2. After three sessions, Arbitrator Daniel Brent found:

> That the convocation of this "safety meeting" was a pretext to communicate to the Company the Union's dissatisfaction about requiring Foremen to carry tools is not simply a justifiable conclusion; it is the only reasonable conclusion. . . .
>
> Thus, by creating a sham safety meeting that not only impeded the timely arrival of bargaining unit employees for their shifts, but also involved many employees until well after the scheduled commencement of their shift hours, and to the extent that customers were deprived of their coveted early morning appointments and other customers were inconvenienced by unnecessary delay in keeping scheduled service appointments throughout the day on April 2, 2014, the Union was directly and inextricably culpable . . .

On November 30, 2015, Arbitrator Brent issued a final award and awarded the Company damages in the amount of $19,297.96.

H. The Investigatory Interviews

After the April 2d strike, the Company launched an investigation to determine the identities of employees involved in the blockade. Employees identified through surveillance video as having attended the work stoppage were summoned to interviews in mid-April. Using a standardized questionnaire, Concetta Ciliberti, Mary Maldonado, and other human resources department managers and supervisors asked each employee nearly two dozen questions.[13] They started with preliminary questions about tenure with the Company, assigned schedules and to whom they reported. The employees were also asked whether they were part of the group of employees who gathered outside the Paidge Avenue facility on April 2, how they got to work, whether they parked, if they arrived in a company vehicle, and what time they arrived. If the employee denied being present, he/she was shown photographs or the video indicating otherwise.

After establishing that the employee was present at the gathering, he or she was told, "It appears that Derek Jordan was present as well." The employee was then asked "who told" the employee about the gathering, "when" the employee received "notification of the gathering," how the "event" was "communicated" to the employee, and what the employee was "told about the reason for the protest." Any employees professing ignorance about the gathering and claiming not to be involved were asked why they remained outside and if they attempted to contact a manager or otherwise attempt to enter the facility.

Employees were then asked questions about the CBA and if they were "familiar with the section that prohibits cessation or stoppage of work." Reading from the script, company managers and supervisors recited that provision followed by standard comments conveying the ramifications of his/her actions on April 2:

> There shall be no cessation or stoppage of work, service or employment, on the part of, or at the insistence of either party, during the term of this Agreement.
>
> You understand that this rally stopped the work of the SNYC Area for over one hour prohibiting us from meeting our service calendar. As a result of this violation of the law and CBA and the inability to maintain our business. Do you understand that this action subjects you to discipline, including possible

[12] The four employees admitted to being a part of the group that gathered in the middle of Paidge Avenue. (R. Exhs. 3–4.) As previously noted, Tsavaris and Cabrera testified that the Union called a safety meeting for the morning of April 2 in front of the facility, while Anderson and Ali asserted that they inadvertently stumbled onto the scene. Anderson's testimony that he drove there on his day off in order to file a grievance over his suspension was not credible. It was preposterous to believe that he drove 55 miles from home, parked his vehicle, took a nap and suddenly woke up to realize that he was blocked in by other vehicles. After attending the event, he left without making any attempt to file his grievance. (Tr. 121, 129–130, 135–142.) Ali, who lives about 40 miles from the facility, testified that he planned to drive into Manhattan to pick up mail, but decided to give a coworker a ride to work, then parked and exited his vehicle because he was curious. That explanation was also absurd. (Tr. 143, 146, 156–162.)

[13] R. Exh. 26–31.

termination?

(If the employee asks what happens next)
We are gathering facts and you should return to work. To be clear, you are prohibited from engaging in any work slowdown or any other action which impacts on workflow. Any attempts to do so will lead to further discipline, including the possibility of immediate termination.
If you have anything else you want to share w/me please call me or send me an email by tomorrow.

The four discriminatees, as well anyone else who was not scheduled to work on April 2, were also asked the following form questions:

Why did you come to work? Did anyone in management direct you to come to work?
[For previously suspended employees] Why did you come to work that day?
You understand that a suspension means that you are not to come to work?
You understand that you were in violation of your suspension by coming to work on April 2? Who directed you to come to work?

Cabrera told company investigators that she drove to the facility merely to drop someone off.[14] Ali also professed ignorance about the event, insisting he only drove to the facility in order to drop someone off while on his way into Manhattan. He also told them that after venturing to the gathering, he learned that the gathering was described as a work safety meeting.[15] Anderson conceded that he was present at the site, but gave no explanation as to why he was there.[16] Tsavaris stated that he "just happened to be in the neighborhood" for "personal" reasons.[17]

I. The Suspensions

On May 22, 2014, the Company issued 2-week suspensions to seven employees determined to be the most culpable for the strike, either because they had no reason to be present other than to participate in the job action or because they engaged in particularly egregious conduct.[18] Approximately 34 employees, all of whom were scheduled to work during the work stoppage, received final written warnings. However, the Company overlooked the roles played by the facility's two shop stewards, including Papale, who was among those suspended on April 1 and not scheduled to work on April 2.[19]

Byron Yu was on the schedule at the time of the strike and played an active role by parking his vehicle in the middle of the street. Joseph McGovern, had called out sick earlier that day. David Lopez was assigned to another company facility and was scheduled to work later that day. The remaining four employees—Ali, Cabrera, Anderson, and Tsavaris—were not scheduled to work that day. The corrective action forms cited four grounds: violation of rules, safety violation, misconduct and "other." Their notices of discipline were virtually identical, with minor differences in the next to last paragraph of each:

Attached is a disciplinary notice that you are being issued a final written warning and being suspended for two weeks effective May 22, 2014 for your role in the April 2 work stoppage in violation of the collective bargaining agreement.

On the day of the illegal strike you were not scheduled to work, but appeared at Paidge Avenue to instigate and participate in the illegal work stoppage. You showed a complete disregard for your responsibilities to the Company and our customers, intentionally impeding service to our customers in violation of the no strike provision in the collective bargaining agreement.

Your conduct justifies immediate termination. However, because we believe you were misled by the Union both about engaging in this conduct and about the consequences of your actions, we are going to give you this last chance. Your participation in any further work stoppages or other activities to impede the Company's business in violation of the collective bargaining agreement will lead to your immediate termination.

You should understand that your blind adherence to the Union's unlawful directives not only put you in danger of losing your job, but reflects very badly on you.

The Company and our customers expect more of you.[20]

J. Regional Director Revokes Dismissal of Union's Charge

On January 5, 2015, the Regional Director for Region 2 dismissed the instant charge on the ground that the April 2nd strike, spurred by the suspension of five foremen and the alleged violation of their *Weingarten* rights, violated the no-strike clause of the CBA and, thus, the Act. Additionally, she opined that the alleged unfair labor practices precipitating the April 2nd work stoppage were not sufficiently serious as to justify overriding the no-strike clause and that the suspensions flowed from employee misconduct during the unprotected strike. However, after Judge Fish issued the aforementioned decision on April 28, 2015, dismissing the complaint alleging unfair labor practices by the Union during the April 2 strike, the Regional Director revoked the dismissal of the instant charge on May 21,

[14] Cabrera testified differently at the hearing, explaining that she got a ride to the facility with a coworker after learning of the "safety meeting" on social media. (Tr. 165.) Given her shifting explanations, I credit Maldonado's denial that she told Cabrera it would constitute insubordination for her to fail to respond. (GC Exh. 15; Tr. 290–291, 303–304, 308–309.)

[15] Ali's explanation to investigators was consistent with his testimony. (GC Exh. 14; Tr. 143, 146.)

[16] Anderson's statements to Maldonado contradicted the video evidence and his hearing testimony. (Tr. 285–287; R. Exh. 14; GC Exh. 16.)

[17] Contrary to his vague explanation to company investigators, Tsavaris conceded at hearing that he was present on Paidge Avenue that morning at Papale's instruction. (GC Exh. 17; Tr. 189–192, 195–196.)

[18] The disciplinary decisions were made by Ciliberti, Cory, and Regional Vice President of Operations John Quigley. (Tr. 113–120.)

[19] GC Exh. 4–7, 28.

[20] The next to last paragraph in Ali's notice added "on you as a foreman" at the end of the sentence, while the notices issued to Anderson and Tsavaris added "on a foreman with your tenure with the Company." (GC Exhs. 4–7.)

2015.

K. The Board Denies The Company's Motion For Summary Judgment

On February 8, 2016, the Company moved for summary judgment dismissing the complaint allegation that it violated Section 8(a)(3) and (1) of the Act when it suspended Diane Cabrera for engaging in serious misconduct by participating in "a job action led by the Charging Party." The motion alleged that the "job action" upon which the complaint is premised constituted a "complete blockade" and disruption of Company's operations for over an hour and, thus, did not constitute protected activity under Section 7 of the Act. The complaint was amended by the Regional Director in order to add the three additional employees who were also suspended – Azeam Ali, Andersen, and Tsavaris.

The General Counsel opposed the motion on the ground that there were genuine factual issues as to whether the four suspended employees lost the protection of the Act by their conduct during the strike activity. On April 8, 2016, the Board denied the Company's Motion for Summary Judgment on the ground that it failed to demonstrate the absence of issues of fact.

LEGAL ANALYSIS

I. THE SUSPENSIONS

The General Counsel and Charging Party allege that the 2-week suspensions issued to Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris constituted unfair labor practices under Section 8(a)(3) and)(1) of the Act. The Company insists that the job action was actually an unlawful mass picket and, thus, the discriminatees engaged in misconduct by being at the event. The Company further contends that such misconduct rendered their activity unprotected.

NLRB v. Burnup & Sims, 379 U.S. 21 (1964), provides the applicable legal standard in cases involving employer discipline of employees who engage in misconduct during protected activities. Under the *Burnup & Sims* test, discipline is unlawful "if it is shown that the employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." Id. at 23.[21]

As orchestrated by the Union, several union officials and company employees halted company operations at 6:33 a.m. on April 2 by positioning seven vehicles in the street in front of the facility. The Union announced the event as a safety meeting and Jordan speak to employees about their *Weingarten* rights and the need to be careful in the field due to the unavailability of suspended foremen. However, the blockade orchestrated by the Union clearly amounted to a work stoppage or strike that lasted nearly 90 minutes and service appointments by technicians were delayed by either a half hour or a full hour. The four discriminatees were part of the group of employees who gathered in front of the Company's facility after the blockade was in place. All four went there at the behest of the Union.

A. The No-Strike Clause

Attendance by the four discriminatees at a Union event, including a work stoppage, discussing and/or protesting the Company's discipline of foremen and alleged violation of some of their *Weingarten* rights clearly constituted protected concerted activity. See *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964) (activity relating to group action in the interest of the employees). However, that conduct lost its protection if it violated an extant no-strike prohibition incorporated into the terms and conditions of their employment. That, in turn, requires an initial determination as to whether the no-strike clause in the expired CBA still applied to unit members as of April 2.

The Board's decision in *IBEW Local 3 (Time Warner Cable)* serves as the law of the case on the issue of whether there was an agreement between the parties regarding the expired CBA by virtue of the MOU entered into by the parties: there was no meeting of the minds as to significant portions of the agreement (the inclusion of local Riders) and thus, the parties did not agree to all of the material terms of a successor CBA.[22] See, e.g., *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1025 fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992), and cases cited therein (generally, a finding necessary to support the judgment in a prior proceeding bars relitigation on that issue in a subsequent proceeding involving the same parties.")

It is the MOU and not the inability to agree to a successor CBA, which is dispositive with respect to the applicability of the no-strike clause to the events of April 2. The no-strike clause was among the numerous provisions of the expired CBA that were to carry over to the successor CBA but were not mentioned in the MOU. Its incorporation by reference in the MOU is evidenced by the introduction: '[T]he changes summarized below were agreed upon *relative to the [CBA] which will expire on March 31, 2013* and that the full text of the applicable changes will be incorporated in a new [CBA] which shall be-

[21] The Company's reliance on *Wright Line*, 251 NLR.B 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), is misplaced. It would have been appropriate if the Company had also disciplined the discriminatees for reasons unrelated to the allegedly protected activity, which is not the case. *Wright Line*, 251 NLRB at 20–21); *Transportation Management Corp*., 462 U.S. at 401–402 ("dual motive" analysis applicable where the protected conduct is shown to be a motivating factor in the discipline, in which case the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct").

[22] The Company's reliance on district court litigation and arbitration between the Company and the Union containing conclusions to the contrary is unavailing. "The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." *Field Bridge Associates*, 306 NLRB 322, 322 (1992), enfd. sub nom. *Service Employees Local 32B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). As the Board noted in *Teamsters Local 769, successor to Teamsters Local 390*, 355 NLRB 197, 200 (2010), this view is consistent with the "well established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests." (quoting *Herman v. South Carolina National Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998).

come effective upon ratification by the Union membership, scheduled for April 4, 2013." (emphasis supplied) The only reasonable interpretation of that preamble is that the changes mentioned into the MOU were being added to the language of the expired CBA along with those provisions not mentioned.

It has long been established that an employer violates Section 8(a)(5) when it unilaterally changes employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and meaningful opportunity to bargain about the changes. *NLRB v. Katz,* 369 U.S. 736, 742–743 (1962). The *Katz* rule, initially applied to newly certified unions, also extends to situations where the parties' agreement has expired and negotiations continue over a successor contract. In such instances, with certain exceptions, the parties are required to continue in effect terms and conditions of employment that are mandatory subjects of bargaining. *Litton Financial Printing Division v. NLRB,* 501 U.S. 190, 198 (1991).

In *Litton*, the court held that no-strike clauses, arbitration provisions and management rights clauses were mandatory subjects of bargaining but did not survive expiration of the contract. The court distinguished such provisions from other terms and conditions that survived because they represented the waiver of statutory rights that employees would otherwise enjoy in the interest of achieving an agreement. Id. at 199.

The parties bargained over the inclusion of Riders in a successor CBA. In the meantime, they continued to adhere to the *status quo ante*, with the exception of the Company's prompt implementation of the wage and benefits provisions of the MOU. This served as the Company's *quid pro quo* and evidence of the parties intent to continue applying certain terms and conditions of the expired CBA, such as the no-strike clause. See *Crimptex, Inc.*, 211 NLRB 855, 858 (1974) (evidence consistent with parties' intention to be bound until the final contract was executed); *Granite Construction Co.,* 330 NLRB 205, 208 (1999) (affirmative nod evidenced an oral agreement to extend the contract until the next bargaining session).

The Board recently referenced the *Litton* principles in *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 2 (2015). In that case, the Board overruled a contrary earlier decision in *Bethlehem Steel,* 136 NLRB 1500 (1962) and its progeny, holding that an employer's obligation to check off union dues constituted a mandatory subject of bargaining and, thus, survived contract expiration. Describing its inextricable link to wages and benefits, the Board distinguished dues checks from no-strike clauses, arbitration and provisions and management rights, which do not survive the contract. Id. at 3.

Litton and *Lincoln Lutheran* are distinguishable. Both cases involved the expiration of CBAs and there was an absence of evidence of subsequent intent by the parties to continue following the contractual provisions at issue. In the instant case, however, the intention of the parties was reflected in the MOU, which incorporated certain provisions from the expired CBA, including the no-strike clause. The MOU constituted a clear continuation of the waiver of employees' rights set forth in the expired CBA. *See Provena Hosps., d/b/a Provena St. Joseph Med. Ctr. & Illinois Nurses Ass'n*, 350 NLRB 808, 812 (2007) (finding that the waiver of a statutory right has to be explicit as well as clear and unmistakable).

Therefore, the no-strike clause, which remained in effect on April 2, prohibited the four discriminatees from the "cessation or stoppage of work, service or employment on April 2. Contrary to the Company's assertion, however, the four discriminatees did not violate the terms of the no-strike clause since they were in a nonworking status at the time. As such, they could not be deemed to have ceased or stopped working during the pendency of the strike.

B. The Conduct of the Discriminatees During the Strike

Even in the absence of an applicable no-strike clause, the activities of the four discriminatees would negate otherwise protected conduct if the Company had a reasonable belief that the employees were engaged in misconduct and the employees did, in fact, engage in misconduct. *Medite of New Mexico, Inc. v. NLRB,* 72 F.3d 780, 790 (10th Cir. 1995) (employer's refusal to reinstate employees justified based on "honest belief" that they engaged in misconduct during strike); *Machinists Local 1150* (*Cory Corp.*), 84 NLRB. 972, 975–976 fn. 9 (1949).

The evidence reveals that the four discriminatees went to the gathering on Paidge Street for a union meeting relating to working conditions, disciplinary actions, grievances and employees' *Weingarten* rights. Over approximately 2 weeks following the April 2 event, company managers and supervisors reviewed security video revealing that the blockade of its operations was fully in place by 6:33 a.m. As a result, prior to calling in the four discriminatees for their disciplinary/investigatory interviews, company officials knew that they were present during the strike, but did not cause the vehicular blockade of company operations. The blockade was implemented by union officials and other employees, and was already in place by the time the four discriminatees congregated in the middle of Paidge Avenue. Moreover, there is no credible evidence that any of the four discriminatees knew before arriving for the event that it would be venued in between vehicles parked in the middle of Paidge Avenue in a manner that would bring company operations to a halt.

Under the circumstances, the relatively passive participation of the four discriminatees at the strike location did not constitute misconduct. See *Abilities & Goodwill*, 241 NLRB 27, 31 (1979) (employer unlawfully discharged striking employees for passive participation in strike); *Bowman Transportation Co.*, 112 NLRB 387, 388 (1955) (insufficient evidence of disciplined employee's active participation in strike). Simply participating in a picket is not grounds for discipline because it would undo the active vs. passive test long applied by the Board. See *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 738 F.2d 1404, 1408 (4th Cir. 1984) (abusive behavior does not amount to serious strike misconduct unless it reasonably tends to coerce or intimidate coworkers); *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984) (quoting *NLRB. v. W.C. McQuaide, Inc.,* 552 F.2d 519, 528 (3d Cir. 1977) (misconduct has to reasonably coerce or intimidate employees from exercising their rights); Cf. *Big Horn Coal Co.*, 309 NLRB 255, 259 (1992) (picketing employees engaged in misconduct by actively interfering with the right of nonstriking employees to continue

working).

The cases cited by the Company are distinguishable. In *Detroit Newspapers*, 342 NLRB 223 (2004), several disciplined employees actively intimidated and violently assaulted coworkers. Id. at 233–234. However, in the case of one employee disciplined for blocking the view of a delivery truck that was backing out of the facility, the Board concluded that the employer did not have a good faith belief that the employee engaged in misconduct. Id. at 231 (surveillance video showed that the employee was not an active participant in blocking the truck driver's view).

In *Kohler*, 128 NLRB 1062 (1960), employees participated in a strike that lasted months and in which the participants were actively engaged in the picket lines that blocked access to the plant. In that case, disciplined employees positioned their bodies in order to block non-striking employees from entering the plant. Id. at 1180. In contrast, the Company knew from reviewing security video that the four discriminatees simply stood in the crowd and had no involvement in constructing the vehicular blockade of the Company's facility and operations. Under the circumstances, the Company unlawfully suspended Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris in violation of Section 8(a)(3) and (1) of the Act.

II. THE INTERROGATIONS

The complaint alleges that the Company unlawfully interrogated employees regarding their "union activities and sympathies of other employees" in the April 2 strike. The Company contends that its questioning of employees was lawful because it related to employee conduct during unprotected mass picketing.

Section 8(a)(1) of the Act prohibits employers from questioning employees in a manner that tends to restrain, coerce or interfere with protected concerted activity. *Rossmore House*, 269 NLRB 1176, 1177 (1984). In determining whether questioning is coercive, we must examine the "totality of the circumstances." Id. at 1178. Factors in determining whether an interrogation is coercive include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. *Bourne v. NLRB.*, 332 F.2d 47, 48 (2d Cir. 1964). The *Bourne* factors provide a framework to use when assessing the lawfulness of employee interrogation. *800 River Rd. Operating Co. LLC v. NLRB*, 784 F.3d 902, 913 (3d Cir. 2015); see also *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1179 (D.C. Cir. 1987) (questioning of employees about their participation in union election by company president, who previously had little interaction with employees and espoused anti-union views, viewed as coercive).

Employees were instructed to meet with company managers, supervisors, and human resource staff in a conference room, where the company officials proceeded to rattle off questions from a prepared script. Certain questions asked of employees were reasonably related to a legitimate investigation seeking to identify employee misconduct, i.e., the perpetrators of the vehicular blockade. These included questions seeking to confirm the employee's presence in front of the facility on April 2, their arrival time, how they got there, whether they drove a company vehicle, and where they parked.

Other questions, however, went well beyond potential employee misconduct or involvement in the vehicular blockade by seeking to elicit employee knowledge about union activities. Employees were asked who told them about the gathering, how and when they learned about the gathering, and what they were told about the reason for the protest. After extracting information about the event, company officials tested employees on their knowledge of the CBA, asking whether they had reviewed it and were familiar with the no-strike clause.

The totality of the circumstances established that the questions relating to employee knowledge about the organization of the April 2 event were coercive. The questions were asked in a formal setting by human resource managers, supervisors, and staff in the presence of shop stewards. Having already established that the employee was present at the gathering on April 2, these questions revealed the possibility of potential or further discipline based on the employee's answers to the questions. See *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 710–711 (2005) (motivation for the questioning was to identify employees who were union sympathizers).

Since everyone in the interview room knew about the union-initiated activity that transpired on April 2, questions relating to communications and planning for the event reasonably conveyed the sense that the Company sought to unearth the employee's union activities, as well as the names of other employees involved with or sympathetic to the Union. A similar coercive effect resulted from the Company's inquiry as to why the four discriminatees, who were not scheduled to work that morning, were at the event. See *Metro-W. Ambulance Service,* , 360 NLRB No. 124, slip op. at 65 (2014) (employer policy preventing employees from being at work when not scheduled to work discouraged protected activities in violation of Sec. 8(a)(1).

Moreover, questions posed to employees about their knowledge of the CBA and, in particular, the no-strike clause, were unrelated to the determination of whether an employee participated in the blockade. Having apprised employees that they were being investigated and questioned in connection with their activities on April 2, inquiries about their familiarity with the CBA and the no-strike clause reasonably tended to chill employees' future union activities.

Under the circumstances, the Company interrogation of employees regarding the events of April 2 violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Time Warner Cable New York City, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris on October 30, 2001, because they engaged in protected union activity by participating in a work stoppage on April 2, 2014.

4. Respondent coercively interrogated employees regarding the events of April 2, 2014, in violation of Section 8(a)(1) of the Act.

5. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily suspended employees, must make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Time Warner Cable New York City, LLC, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Suspending or otherwise discriminating against employees because they engaged in protected union activity.

Coercively interrogating any employee about union support or union activities.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Make Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions of Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris and, within 3 days thereafter notify the employees in writing that this has been done and that the suspensions will not be used against them in any way.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility Brooklyn, New York, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2014.

Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by Time Warner Cable New York City, LLC, if willing, at all places or in the same manner as notices to employees are customarily posted.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 14, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or otherwise discriminate against any of you for supporting Local Union No. 3 International Brotherhood of Electrical Workers AFL–CIO or any other union.

WE WILL NOT coercively question you about your union support or activities.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Diana Cabrera, Azeam Ali, Ralf Anderson and Frank Tsavaris whole for any loss of earnings and other benefits resulting from their suspension, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions of Diana Cabrera, Azeam Ali, Ralf Anderson, and Frank Tsavaris, and

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

TIME WARNER CABLE NEW YORK CITY, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-126860 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.